In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-740

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET. AL., APPELLANTS
V.
L. DOUGLAS ALLARD, ET. AL.

BRIEF FOR APPELLEES

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INDEX

CITATIONS

Cases: **Page**

CITATIONS

Cases: **Page**

CITATIONS

Cases: Page

Constitution, Treaties, Statutes and Regulations:

CITATIONS

Page

Miscellaneous:

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QUESTIONS PRESENTED

1. Do the Eagle Protection Act and the Migratory Bird Treaty Act prohibit all sales of feathered American Indian Artifacts which predate the effective date of the statutes?
2. Can the Appellants constitutionally prohibit all sales of feathered Indian artifacts which were created prior to the protection of various birds afforded by the Eagle Protection Act and Migratory Bird Treaty Act?

STATEMENT

This action concerns American Indian artifacts comprised in part of feathers of various birds now within the protection of the Eagle Protection Act and the Migratory Bird Treaty Act. Each artifact was crafted and constituted private property prior to the effective date of any applicable legislation.[1] The oldest item, a Plateau war bonnet, owned by Appellee Ward, was created more than 175 years ago.[2]

Appellees do not claim any interest in items made from illegally-killed wildlife, nor do they claim any particular rights to use wildlife subject to existing regulation.[3] Appellees accept that protection of existing wildlife is a legitimate governmental purpose and state their support for such a goal.

Appellees do claim fundamental property rights in Indian artifacts which predate the protective legislation.

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[1] This action was determined by the District Court on cross motions for summary judgment. Prior to the Appellants' Motion for Summary Judgment, the Appellees had produced and described each artifact pursuant to the Defendants' First Set of Interrogatories to Plaintiffs, and Defendants' Motion for Production. Appellants did not challenge the genuineness, nor the age stated for any artifact and such statements, for the purposes of this action, must be accepted as fact. A description of each artifact and the age of each artifact is set forth in Appendix, pages 50-60.

[2] Item No. 4, answer of interrogatory by Robert G. Ward, Appendix, page 52.

[3] In this regard, the claims of the Appellants are to be distinguished from those which were presented by various manufacturers desiring the right to continue to use skins from existing wildlife for commercial purposes, in *A. E. Nettleton, et al. v. Diamond,* 27 NY2d 182, 315 NY Supp2d 625, 264, NE2d 118, 44 ALR3d 993; appeal dismissed, 401 U.S. 969, 91 S Ct 1201, 28 L Ed2d 319. In this action, Appellees do not claim any right to the continued taking of wildlife for the production of commercial materials.

Appellants purport to prohibit, absolutely, Appellees' rights to dispose of their property by any sale or exchange, notwithstanding that the items are of substantial value and admittedly predate the statutes enforced by the Appellants.

The artifacts which the Appellants would ban from commerce are not only harmless in themselves,[4] but have been declared by Congress to be worthy of legislative protection.[5]

A Convention between the United States and Great Britain (39 Stat. 1702), concluded in 1918, established the pertinent regulatory framework. The enactment of the Migratory Bird Treaty Act (16 USC § 703 *et seq*) on July 3, 1918, implemented this convention.

Other Conventions, with Mexico in 1936,[6] (supplemented in 1972[7]), Japan in 1974,[8] and the Soviet Union in 1978,[9] added additional birds to the provisions of the Migratory Bird Act.

While the Migratory Bird Act dates from 1918, it should be noted that the type of birds whose feathers had been predominantly used to create the Appellees' artifacts

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[4] See: *United States v. Fuld Store Co.*, 262 F 836 (D Montana 1920) at page 837: "In harmless, useful, and valuable property there is a vested right of possession, use, enjoyment and sale—a liberty of action, of which owners cannot be arbitrarily deprived without compensation."

[5] See 16 USC §470; §470 a.(b)(3); also see pending legislation for the protection of antiquities, being HR 1825 and SB 490.

[6] 50 Stat. 1313.

[7] Letter of March 10, 1972, of U. S. Ambassador to Mexico, 23 U.S.T. 260 T.A.I.S. #73-02.

[8] 25 U.S.T. 3329.

[9] November 19, 1976, 7 Environmental Law Reports 40318.

were not included in the Migratory Bird Conventions until 1972.[10]

In 1974, an amendment was added to the Migratory Bird Act (P.L. 93-300, §1, 88 Stat. 190) in which, for the first time, the Act referred to ". . . any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird [those within the Convention] . . ."

Following the 1972 supplement and the 1974 Amendment, the Appellants, through the Bureau of Sports Fisheries & Wildlife, notified Indian Arts and Crafts dealers, by certified letters, of their apparent intent to apply the Migratory Bird Act and the Eagle Protection Act to all items regardless of age.[11] Enforcement, according to this interpretation of the Acts, was initiated. Appellees Allard and Bovis were criminally prosecuted for the sale of pre-existing artifacts to undercover agents.

Faced with the likely prospect of continued enforcement against sales of artifacts created prior to the Act and without Executive recognition of any exemption, the Appellees filed this action on September 19, 1975, pursuant to the Declaratory Judgment Act (28 USC §2201), seeking declaratory and injunctive relief (28 USC §2282). Jurisdiction was premised upon 28 USC §§ 1331 and 1337.

On cross Motions for Summary Judgment, the District Court determined that the prohibitions in the Eagle

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[10]The feathered artifacts, as described by the Appellees, Appendix, pages 50-60, predominately include feathers from eagles, hawks, and owls. These types of birds were added to the Migratory Bird Treaty Act by the exchange of letters between the Ambassadors of the United States and Mexico, supra, footnote 7.

[11]See Exhibit C, letter from the Department of the Interior to Appellee Ward, Appendix, pages 30-34.

Protection Act and the Migratory Bird Treaty Act were not applicable to pre-existing, legally obtained, feathered Indian artifacts; the interpretive regulations were therefore unauthorized extension of the Acts and violated Appellees' property rights afforded by the Fifth Amendment. The Court suggested a reasonable regulatory procedure[12] as an acceptable balance between the public purpose and the property rights of the Appellees. The District Court weighed each legal and factual issue germane to the difficult determination of when "justice and fairness" dictate that the burdens imposed on the few are so disproportionate as to invalidate the regulatory scheme. The Court considered, as it must, the unique circumstances presented in this case. The Appellants, the Court concluded, sought to place a disproportionate and therefore impermissible burden on the Appellees.

SUMMARY OF ARGUMENT

The Eagle Protection Act, 16 USC §668, and the Migratory Bird Treaty Act, 16 USC §703 do not apply to lawfully acquired feathered Indian artifacts which were created and privately owned prior to the effective date of the protective legislation.

Six Federal Courts, prior to the decision of the three-judge District Court in this case, have considered the application of the Migratory Bird Act to pre-existing property. Each Court has determined that the Act does not

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[12]District Court Opinion, Jurisdictional Statement, Appendix A, page 12a. The regulation procedure provided by the Marine Mammal Protection Act, 16 USC §1361; and the regulations implementing this Act, being 50 C.F.R. §18.14, was noted as an "obvious possibility."

prohibit sales of property which existed prior to the Act. No Court in over fifty years of consideration has upheld the position of the Appellants.

Neither Act specifically includes pre-existing property and the legislative intent of each Act is obviously to protect living birds. This intent cannot be furthered by an interpretation of the Acts which continue to permit possession and "gratuitious" transfers of the feathered portions of any artifact, yet stating that "commercial" sales of feathered artifacts are unlawful.

Since all value of the pre-existing artifacts is destroyed by the ban of all "commercial" sales of such items, there is not only a grave doubt as to the constitutionality; but an unauthorized and unlawful taking of the property of the Appellees without compensation and without remedy in a suit under the Tucker Act, 28 USC §1491.

Using the tests enumerated by this Court in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the constitutional invalidity of the Appellants' application of the Acts to prohibit all commercial sales of pre-existing feathered artifacts is shown:

1. All value of the Appellees' property is destroyed, and such destruction of value is not merely a consequence of regulation, but is the purpose of the Appellants.

2. While the protection of existing wildlife is a legitimate goal, the health and safety of the citizens is not imminently threatened; furthermore, alternative and less drastic regulatory procedures are available which can properly balance the public need with the private loss. Without considering regulations which are sufficient in notably comparable areas, the Appellants seek the most drastic remedy available.

3. The Appellees, who by definition cannot receive any value for their property, are solely burdened with the complete loss of the value of their property. No opportunity of mitigation is offered.

Fairness and justice require that the Appellants cannot place such an impermissible burden upon the property and lawful occupation of the Appellees within the constitutional limits.

The District Court was correct in its conclusion that neither the Eagle Protection Act nor the Migratory Bird Treaty Act prohibit the Appellees from disposing of their property for value. To so apply the Acts, would create a grave question as to their constitutionality which can only be avoided by the exclusion of the items from the total prohibition sought by the Appellants.

ARGUMENT

I. Neither the Eagle Protection Act nor the Migratory Bird Treaty Act apply to pre-existing Indian artifacts. An interpretation that the acts ban all commercial transactions creates grave constitutional doubts as to their validity.

Appellants open their argument by positing that the record establishes two facts:[13]

1. Since genuine Indian artifacts are highly valued, a strong incentive exists to "pass off" recent copies as originals or to replace feathers in existing artifacts; and

2. There is no scientific test to determine the age of a feather.

The record does not support such assertions and Appellants' argument does not address the facts. The assertion

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[13]Brief of Appellants, page 13.

that the sale of antique artifacts has a causal relation to the killing of protected birds is an unfounded assumption.

This action is concerned with genuine feathered artifacts. Nowhere does the record support the Appellants' contention that counterfeits are or can be economically made or that "replacing feathers"[14] is an incentive to kill living birds. What the record does establish is that the Appellants have no basis to state or imply that a counterfeit market for Indian artifacts exists or that birds are being killed to supply the imagined market.[15]

The fact that a scientific test cannot date a feather does not preclude the ability to date an artifact of which the feathers are but a part. In reply to interrogatories, the Appellees have stated tests that can distinguish lawful artifacts; notably: documentation, personal knowledge, and expert appraisal.[16] The Affidavit of Dr. Alan Brush,[17] re-

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[14]The suggestion that one might "replace feathers" in a genuine artifact is contrary to common sense. The integrity and value of what would have otherwise been a genuine antiquity would be destroyed. Nothing in the record suggests that the value of any particular artifact depends upon the condition of its feathers.

[15]See Answers to Plaintiff's Interrogatories to Defendants, Second Set, Interrogatory No. 11.

Interrogatory No. 11: On a yearly basis from 1971 to date, state a general approximation of how many and what kinds of birds were "taken illegally" for the purpose of producing craft items similar to those types of items which are the subject of this action? (a) State the basis and source from which such approximations were provided.

Answer: The defendants are without knowledge or information sufficient to answer this interrogatory.

[16]See Appellants' Answers to Defendants' First Interrogatories to Plaintiffs, No. 1(c), Appendix, pages 50-60.

[17]Affidavit of Dr. Alan H. Brush, May 31, 1978, Appendix, pages 44-47.

lied upon by Appellants, in reality supports Appellees' position that exact age can be established by documentation and other circumstances surrounding an artifact.

Appellants continue by asserting that "stringent measures" are necessary to protect existing wildlife. While regulations and concern for protecting existing wildlife are certainly important, as this Court has noted in *TVA v. HILL,* 437 U.S. 153 (1978), the greatest threat faced by wildlife is the destruction of natural habitats. Appellants have not asserted that all sales of real property which could endanger destruction of habitat are unlawful. The sale of pre-existing artifacts bears no relation to the primary threat to wildlife. The logic inherent in proscriptive measures is stretched to its extreme when applied against antiquities. In notably parallel statutes[18] the "stringent measures" to protect other endangered wildlife do not require the complete commercial ban of antiquities.

Moreover, the Appellants' position that the Migratory Bird Act requires "stringent measures" to protect wildlife from sales of antiquities was made untenable by the actions of the Department of Interior which recently killed millions of grackles and blackbirds (birds which are included in the Migratory Bird Conventions), pursuant to Public Law 94-297, 94th Congress, February 4, 1976.

How can Appellants argue that the sale of an antique artifact including a grackle or blackbird feather endangers the protection of species in view of their own actions?

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[18]Marine Mammal Protection Act, 16 USC §1361, especially §1372(e). See also 50 C.F.R. §18.25, 50 C.F.R. §18.14. Endangered Species Act of 1973, 16 USC §1531 *et seq;* and particularly the 1978 amendment to the Endangered Species Act, Public Law #95-632, 92 Stat. 3760-3761. See also 50 C.F.R. §17.4.

Appellants' intimation that the killing of eagles for "commercially motivated" purposes[19] has something to do with Indian artifacts is wholly unsubstantiated. The report of destruction of eagles which was a part of the basis for the 1972 Amendment to the Eagle Protection Act[20] relates to deplorable killings which were an abject waste of the birds. There is no suggestion of any "commercial" motive; nor any suggestion of an intent to sell the birds which were killed, much less to use them in an attempt to counterfeit Indian antiquities.

An analysis of the legislative intent of the Migratory Bird Act demonstrates, contrary to the position of the Appellants, that the Act was not intended to and does not apply to pre-existing art. The terms of the Act do not include any pre-existing items. The obvious intent of the statute is to protect living birds.

In *Missouri v. Holland,* 252 U.S. 416, 642 L Ed 641 (1920), the facial constitutionality of the Act was upheld by this Court. Its decision was based upon the consideration of living birds, not a regulation of commerce of existing Indian art:

> " . . . Wild birds are not in the possession of anyone; and possession is the beginning of ownership." *id* at 434

The Court further noted:

> " . . . The subject matter is only transitorily within the state, and has no permanent habitat therein." *id* at 435

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[19]Brief for the Appellants, page 16.

[20]Senate Report #92-1159. U.S. Congressional and Administrative News, 1972, pages 4285-4288.

The artifacts in question do not have the same nature as a living bird of which the Court noted " . . . yesterday [had] not arrived, tomorrow may be in another state, and in a week a thousand miles away." (*id* at 434)

Six Federal District and Circuit Courts have considered the application of the Migratory Bird Act to previously existing property. Each has determined that the Act does not include such property. In over fifty years of consideration, no Court has accepted the position of the Appellants.

In *United States v. Fuld Store,* supra, footnote 4, the District Court of Montana considered the interpretation of the Act regarding lawfully acquired feathers. The Court noted that the intent of the Act was prospective:

> " . . . to protect birds in the future to make killing them in the future a crime, and incidentally to make possession or offer of sale of any part of the birds unlawfully killed (that is, killed in the future) also a crime." *id* at 837

The Court's conclusion, as expressed at pp. 837-838:

> " . . . the act relates only to birds and parts of birds killed subsequent to the act, a permissible and more reasonable construction, and in principle always to be preferred to avoid grave doubts of the validity of the law otherwise."

Similarly, in *United States v. Marks,* 4 F2d 420 (S.D. Tex. 1925), the District Court for the Southern District of Texas, stated, after noting that the Congressional power to regulate migratory birds derived from the Treaty Power and not otherwise:

> "In light of this principle, the act (Migratory Bird Act) must be construed as entirely prospective in its operation as to taking or killing birds,

> and so as not to convert into a penal act either the possession or sale of a bird, or part of a bird, taken before its enactment." *id* at 421

The interpretation that the Migratory Bird Act applies only prospectively is not limited to cases from the 1920's.[21] In *United States v. Aitson* (10th Cir. #74-1588, unpublished opinion, July 21, 1975) the United States Tenth Circuit Court of Appeals considered the applicability of the Migratory Bird Act to pre-existing feathers and concluded that commerce in such material was not illegal. The Court stated that the pre-existing nature of feathers would be an "apparent" defense to prosecution under the Act.

In *United States v. Blanket,* 391 F. Supp 15 (W.D. Oklahoma 1975), the District Court assumed (without the necessity of deciding) that possession prior to the effective date of the Act is a defense against the prosecution for selling after the effective date of the Act; but upon the evidence presented, the Court found that the Defendant had failed to satisfactorily establish the pre-existing nature of the material.[22]

In *United States v. Hamel,* 534 F2d 1354 (9th Cir. 1976), the Ninth Circuit Court implied that the Migratory Bird Act did not proscribe commerce in pre-existing items; however, since the Defendant had offered no evidence to support the proposition that the birds were taken before

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[21]See also In Re Information under Migratory Bird Treaty Act, 281 F 546, (D. Montana 1922).

[22]This case additionally establishes the fact that a successful prosecution can be maintained and proved against a defendant who asserts the pre-existing nature of particular feathers; the expert witness presented by the prosecutor did establish, beyond a reasonable doubt, that the materials therein being considered were not pre-existing items.

the Act's effective date, the Court was not required to specifically state its determination.

Considering similar legislation, the New York Court of Appeals in *A. E. Nettleton Co. v. Diamond,* supra, stated (citing from 44 ALR3d at 1005):

> "As to the Industry's contention that the Mason Law is confiscatory in that it bars all sales, or offers for sale, after September 1, 1970, thus rendering valueless the inventory on hand and imported into the State while it was legal to do so, we do not think that such a result was the intent of the Legislature. Such a prohibition could in no way effectuate the purpose of the Mason Law since it could not afford protection to the animals already destroyed. It is, therefore, our view that the Mason Law does not apply to skins, hides, or products therefrom which arrived in the United States of America on or before August 31, 1970, providing that the time of arrival shall be documented either by official U. S. Customs records or authentic inventory or shipment records of the holder or any predecessor in title which is a United States corporation, firm, or person legally engaged in the business of handling the products on August 31, 1970."

The Appellants' interpretation of the Act lacks judicial support.

Further, the legislative history and the language of the Act and conventions compel the conclusion that pre-existing artifacts are excluded from the prohibitions.

The Migratory Bird Act does not define the birds given protection. Such definition is provided only by the Conventions themselves.

In 1974, the Migratory Bird Act was amended to include the Convention between the United States and the Government of Japan. The language of the Convention between the United States and Japan directly excludes lawfully obtained materials. Article III of the Convention provides:

ARTICLE III

> I. The taking of the migratory birds or their eggs shall be prohibited. Any sale, purchase or exchange of these birds or their eggs, *taken illegally,* alive or dead, any sale, purchase or exchange of the products *thereof,* or their parts shall also be prohibited." (emphasis supplied)

Mr. Nathaniel P. Reed, Assistant Secretary of the United States Fish and Wildlife Service,[23] expressed this exact interpretation of the Convention in the official agency comment of the United States Department of the Interior to the Chairman of the Committee on Commerce. As stated by Mr. Reed, then the Assistant Secretary of the Interior:

> "The Convention contains a provision that prohibits the taking of migratory birds or their eggs.

[23]Mr. Reed, as Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior, was an original party. Mr. Reed's successor in office is a present party Appellant. Regarding the impact of conservation laws upon persons who have already owned various materials Mr. Reed also stated his "great concern [that] individual legally possessed, prior to the enactment of the 1973 Act [Endangered Species Act] parts or products of endangered species for the purpose of sale or for other activities of a commercial nature." Letter from Nathaniel Reed to Carl B. Albert, September 30, 1975, reprinted in H.R. Rep. #94-823, 94th Congress, 2nd Sess., 8 (1976) US Congressional and Administrative News, 1976, page 1691.

> It also prohibits the sale, purchase or exchange of these birds or their eggs, *taken illegally,* alive or dead, and the products thereof or their parts." (emphasis supplied)
>
> (U. S. Code, Congressional and Administrative News, 93rd Congress, 2nd Sess. 1974, Vol. 2, p. 3254)

The Appellees do not challenge Mr. Reed's interpretation of the Convention.

Nor do Appellees challenge any restrictions imposed upon the taking or subsequent use of existing wildlife. Appellees do not claim any rights to the continued killing of protected wildlife or commercial use of any such animal.[24] However, imposing substantial restrictions on, or prohibiting absolutely, the future taking or use of wildlife is fundamentally different from abrogating property rights in material privately owned prior to any restrictive legislation.

Appellants, by citing various conservation cases[25], ignore the fundamental property issue presented by this case. In each of the cases cited, the proscription contemplated future takings of wildlife. As the statutes being considered prohibited the "possession" of wildlife of a particular type, an obvious *ex post facto* situation would be presented if any of these Acts were to be applied to previously owned specimens or products. Statutes limiting

[24]See footnote No. 3, supra.

[25]*Bayside Fish Co. v. Gentry,* 297 U.S. 422 (1936); *State v. Shattuck,* 96 Minn 45, 104 NW 719 (Sup. Ct. 1905); *Commonwealth v. Savage,* 155 Mass 278, 29 NE 468 (Sup. Jud. Ct. 1892); *People v. Dornbos,* 127 Mich 136, 86 NW 529 (Sup. Ct. Mich., 1901); *Javins v. United States,* 11 App. D.C. 345 (1897); *Maritime Packers v. Carpenter,* 99 NH 73, 105 A2d 33 (Sup. Ct. 1954); *Salasnek Fisheries, Inc. v. Cashner,* 9 Ohio App2d 233, 244 NE2d 162 (Ct. App. 1967).

or prohibiting the future killing and imposing restrictions upon the use of anything so taken do not create the present issue.

Appellants suggest[26] that the intent of the Migratory Bird Act can be ascertained by a review of the "scope of comparable statutes."

One of the comparable statutes, the Endangered Species Act of 1973, supra, intending the preservation of endangered species the "highest of priorities",[27] nonetheless *exempts* any pre-existing item not being held for commercial purposes on December 28, 1973.[28].

Section 1538(b) provides:

> "(b) Species held in captivity or controlled environment. The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on the effective date of this Act (Dec. 28, 1973) if the purposes of such holding are not contrary to the purposes of this Act; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from the effective date of this Act (Dec. 28, 1973), there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on such effective date (Dec. 28, 1973)."

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[26]Brief for the Appellants, page 26.

[27]*TVA v. Hill*, 437 U.S. 153 (1978).

[28]Any antiquity being held in a private collection on December 28, 1973, appears to be thereafter exempted from the prohibitions of the Endangered Species Act. See example No. 2, 50 C.F.R. §17.4(a).

The statute contemplates future commercial transactions with respect to pre-existing articles. A rebuttable presumption is established, but the exemption itself is granted. The scope of this statute, dealing solely with those animals requiring the greatest protection does not support a more inclusive presumption for the Migratory Bird Act.

The comparable Marine Mammal Protection Act also excludes pre-act property.[29]

Considering the language of the Act, comparing it with similar conservation statutes, and as universally interpreted by the Courts, the Migratory Bird Act does not apply to pre-existing Indian artifacts in which private rights had vested prior to the date of the statute.

The intent of the Eagle Protection Act to include pre-existing artifacts is even less apparent than the Migratory Bird Act. The Eagle Act to this date does not include "products" within its proscriptive terms. An ordinary interpretation of the Act would not include craft items created before the Act; feathers used as components had already lost their identity as "eagles" or "parts."[30] One does not consider a painted shield containing feathers on its perimeter an "eagle" nor "feathers"; through human effort, the raw materials had already become something else. The Eagle Protection Act does not encompass pre-existing craft items in which the component parts had lost a separate identity prior to the passage of the Act.

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[29]See footnote no 18, supra

[30]See: *United States v. Richards*, 583 F2d 491 (10th Cir. 1978). The distinction between "birds" and "artifacts" was noted by the Court in distinguishing its decision from the decision of the District Court in this action.

More importantly, however, the interpretation urged by the Appellants reduces the Eagle Act to an absurdity, incapable of promoting its protective intent.

At page 15 of their brief, Appellants state that "gratuitous transfers" are condoned, but "commercial" transfers are not. The Act does not require the destruction of feathered artifacts nor a physical separation of the feathers at the time of the lawful sale of the wood, hide, cloth, and paint also composing "the" artifact. Since artifacts are composed only in part of feathers, often a small part, nothing prevents a sale of the "lawful" portion of the artifact and a "gratuitous" transfer of the outlawed feathers.[31] But what is the purpose of the exercise? Worse, what is the purpose of requiring the offending feather to be cut off so the balance of the "artifact" can be sold without question: a bastardized relic not indicative of its heritage, but a monument to formalism and misplaced intent?

The Eagle Protection Act, in its silence concerning pre-existing native art, must be reasonably interpreted to accomplish its purpose: a purpose which cannot be furthered by permitting "gratuitous" transfers of feathers and "commercial" sales of the other components of the whole. An interpretation requiring the destruction of antiquities to make the remnants "lawful" is a cultural tragedy.

CONSTITUTIONALITY

II. Neither the Eagle Protection Act nor the Migratory Bird Treaty Act can constitutionally prohibit all sales of pre-existing American Indian Artifacts. To do so would be an unwarranted and impermissible burden upon property rights afforded by the Fifth Amendment.

[31] It is not at all certain that the separation of the components of a sale would constitute a sham. Certainly no sham transaction would be involved if the offending feathers were physically removed from the artifact at the time of sale and subsequently gratuitously conveyed.

Pre-existing artifacts constitute private property to be afforded constitutional protection.

It has long been recognized that the possession of wildlife creates a property right. *Shouse v. Moore,* 11 F Supp 784 (ED Kentucky 1935).

On several occasions, this Court has noted that private property rights vest when wildlife is reduced to possession and thereafter become articles of commerce. See *H. P. Hood and Sons, Inc. v. DuMond,* 336 U.S. 525 (1949); *Douglas v. Sea Coast Products, Inc.,* 431 U.S. 265 (1977); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); see also *Missouri v. Holland,* supra, p. 10.

Any speculation that the pre-existing artifacts are somehow "special" private property, subject to more restrictive regulation because they are made from natural materials, has been dispelled by this Court in *Hughes v. State of Oklahoma* (#77-1439, April 24, 1979, 47 Law Week 4447):

> " . . . regulation of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore (we) expressly overrule *Geer.*" *id* at 4451

This Court has also recognized that the right of disposing of property is an essential attribute of ownership. See *Goldblatt, et. al. v. Town of Hempstead,* 369 U.S. 590 (1960); *Mugler v. Kansas,* 123 U.S. 623 (1887). It cannot be doubted that essential ownership rights are as much protected by the Constitution as the property itself. See *United States v. General Motors Corporation,* 323 U.S. 373 (1944); *Buchanan v. Warley,* 245 U.S. 60 (1917).

In considering the Constitutional claims, Appellants initially deny Appellees standing.

The bases of Constitutional challenge asserted by the Appellees were not limited solely to diminution of property values.

Appellees asserted an unconstitutional limitation upon their liberty of lawful occupation.[32] Two of the Appellees, Bovis and Allard, suffered criminal prosecution for the sale of pre-existing artifacts. The likelihood of further prosecution is noted by the record.[33]

Appellants' limited challenge to the standing of the Appellees does not address the multiple bases upon which standing is afforded. Moreover, the limited challenge itself is not sustainable.

Appellee Ward personally owned feathered Indian artifacts prior to the effective date (1972) of the Migratory Bird Treaty Act with respect to birds of the same type as those which had been used to make the artifacts; such is

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[32] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), at page 572:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L Ed 1042, 1045, 43 S Ct 625, 29 ALR 1446. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

[33] See Answers to Plaintiffs' Interrogatories to Defendants, Second Set, especially answers to interrogatories numbered 4, 6, and 8.

shown by the record.[34] The personal ownership of artifacts by the other Appellees prior to the 1972 Supplement and the 1974 Amendment to the Migratory Bird Treaty Act also exists, but is not specifically disclosed by the record as the particular standing question now asserted was not alleged in the District Court.[35]

Appellants' limited challenge for lack of "personal property rights" also overlooks the fact that Appellees not only possessed property rights in artifacts when the case was filed, but continue to possess the same property rights. Judicial construction of the Acts has universally affirmed private property rights in pre-existing materials.[36] Every Court which has considered the Acts has declared pre-existing material to be outside the proscriptions. Unless this Court shall retro-actively reverse the ruling of the District Court, and overrule all existing precedent, Appellees presently own property which can lawfully be sold for value. Standing to preserve such rights against the claims of the Appellants should be apparent.

Broadly stated, the basic issue is whether the Appellants' regulatory scheme places such a burden on the Appellees that "fairness and justice"[37] require that the impact

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[34] See answer of Appellee Robert G. Ward to defendants' interrogatory no 17, Appendix, page 54. Priority of ownership is established by comparison of types of feathered artifacts listed by appellee Ward with effective date of inclusion of particular type of birds within the Migratory Bird Treaty Act, supra footnote 10.

[35] Appellants' jurisdictional challenge in the District Court was based upon a lack of "case or controversy" upon the supposed non-existence of the threat of enforcement. In light of the fact that two of the Appellees had actually been prosecuted for violation of the Acts, the District Court did not sustain the motion of the Appellees.

[36] See: supra p. 11-13.

[37] *Armstrong v. U.S.*, 364 U.S. 40 (1960).

cannot be borne solely by the few who are directly affected. The precedent of Courts for fifty years, from Montana to Texas and from the Tenth Circuit to the State of New York is unanimous: fairness and justice do not permit the complete destruction of property rights in pre-existing artifacts. In reviewing the broad precept, this Court should not lightly weigh such an unanimity of expression.

The Constitutional touchstone for reviewing the limits of police powers remains Mr. Justice Holmes' statement in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), that:

> "As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitaion must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *id* at 413

Similarly, the statement of the test regarding the reasonableness of the exercise of the police power was provided by this Court in *Lawton v. Steele*, 152 U.S. 133, at page 137, (1894); restated in *Goldblatt*, supra, at 594:

> "To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

Practical criteria, useful for a resolution in accord with the stated policies, were enumerated by this Court in *Goldblatt* and most recently reviewed in *Penn Central Transportation Company, et. al. v. City of New York, et. al.*, 57 L Ed2d 631, (#77-444, June 26, 1978):

1. A comparison of values of the Complainants' property before and after the regulation is imposed, is a relevant factor.[38]

2. The purpose of the legislation and its direct relation to the health and safety of the population is of importance.[39]

3. The nature of the menace against which the regulation will protect and the availability and effectiveness of other less drastic protective steps are important considerations.[40]

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[38] See: *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Pennsylvania Coal Co. v. Mahon*, supra.

[39] See especially *Mugler v. Kansas*, supra; *Murphy v. California*, infra p. 25; also see Mr. Justice Rehnquist (dissenting), *Penn Central Transportation Co.*, supra at 57 L Ed 631:

> "The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others."

[40] *Goldblatt*, supra; also see *Shelton v. Tucker*, 364 U.S. 479 at 488 (1960):

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

4. The existence of an "average reciprocity of advantage" is a factor.[41]

While a "taking" may be more readily found when the interference with property can be characterized as a physical invasion by the government,[42] such a limited reading of the protection afforded by the Constitution has long since been relegated to the rank of an academic curiosity.[43]

In *United States v. General Motors Corporation*, supra, at page 378, this Court has noted that it is the:

> ". . . deprivation of the former owner rather than the accretion of a right or interest to the sovereign (that) constitutes the taking."

In the instant case, the Appellants would absolutely prohibit the Appellees from disposing of their property for value. The destruction of value of the Appellees' property

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[41] *Pennsylvania Coal Co. v. Mahon*, supra; also see Mr. Justice Rehnquist (dissenting) *Penn Central Transportation Co.*, supra, 57 L. Ed2d 631 at 662-663;

> "Even where the government prohibits a non-injurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.' [citations omitted] It is for this reason that zoning does not constitute a 'taking.' "

[42] See *Mugler v. Kansas*, supra; *Penn Central Transportation Co.*, supra.

[43] See VanAlstyne "Takings or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 SoCal Law Review 1, (1971) at Page 7

is not just a consequence, but is the purpose of the regulation.[44]

Nor can the Indian artifacts collected by the Appellees constitute a nuisance or property which *of itself* is a harmful commodity. Cases cited by the Appellants, predominately *Mugler v. Kansas*, supra, and *Murphy v. California*, 225, U.S. 623 (1912),[45] are simply not applicable. Indeed, far from being harmful commodities or nuisances in themselves, the artifacts are of substantial cultural importance and have been declared to be objects for national preservation and concern. [46]

Additionally, in *Mugler*, supra, the assumption of a continued interstate market was an additional factor presented to the Court. Mugler chose not to avail himself of the potentially lawful market and thus utilized his prop-

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[44] *Armstrong v. U.S.*, 364 U.S. 40 at 48 (1960);

> "It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. . . . This case and many others reveal the difficulty of trying to draw the line between what destruction of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable." [citations omitted]

[45] It is certain that Mr. Justice Lamar, speaking for the Court, was convinced that the keeping of a billiard hall was beyond question an activity harmful in itself:

> "That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted . . . The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation."

The decision of the Court in this case is unparalleled in its statement of "uncontroverted" fact and the scope of legislative notice accepted.

[46] See supra footnote 5.

erty contrary to the law of the State where such had been determined to be an actual nuisance and harmful in itself to the health and welfare of the community. No Fifth Amendment question was recognized.

Jacob Ruppert v. Caffey, 251 U.S. 264 (1920), while the decision was based upon the war power, did reject the claim that property was "taken." Even so, on the record presented to the Court, the existing stocks of beer were assumed to have been produced subsequent to the passage of the Volstead Act. Rather than support the position that pre-existing property can be destroyed, *Ruppert* is only consistent with the position that an an illegal product – one made with an illegally taken animal – creates no rights in the holder. Appellees state no disagreement.

The ordinance upheld by this Court in *Goldblatt,* supra, was passed as a "safety ordinance" having a direct relationship to the health and safety of the citizens. The direct protection of the safety of citizens by prohibiting a noxious use of the property, even so, is limited to those restrictions which abate the nuisance and which do not deprive a citizen of property absolutely. The prohibition upheld by this Court in *Hadacheck v. Sebastian,* 239 U.S. 348 (1915), was specifically distinguished from an ordinance prohibiting the valuable use of property in *Ex Parte Kelso,* 147 Calif 609, 82 P241 (1905) (*id* at 411-412).

As stated by Mr. Justice Field in *Mugler v. Kansas,* supra:

> "It has heretofore been supposed to be an established principle that where there is a power to abate a nuisance the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals." (dissenting opinion)

Where a danger can be eliminated by a less restrictive regulation than total prohibition, the Constitution protects

against an unwarranted scope of property invasion. See *Curtin v. Benson,* 222 U.S. 78 (1911). Also see *Shelton v. Tucker,* supra

In the present circumstances, the total ban applied to pre-existing artifacts goes far beyond that required to protect the legitimate interests of the public and is an unwarranted proscription of private property rights.

By citing *Ruppert,* supra, and *Everards Breweries v. Day,* 265 U.S. 545 (1924), Appellants apparently urge that the war power inherent in Congress absolves them from responsibility for the destruction of Appellees' property rights.

Appellees accept that the common law and this Court have long recognized that the sovereign is absolved from responsibility for destruction of property in doing what must be done in times of imminent peril.

As stated by this Court in *United States v. Caltex,* 344 U.S. 149 (1952), at page 154:

> ". . . the common law had long recognized that in times of imminent peril – such as when fire threatened a whole community – the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."

The war power, however, provides no basis for the Appellants' position in this action.

Nor does this case present a "last ditch" effort in which other less restrictive regulations have failed. In its decision, the District Court made specific reference to the fact that other less drastic regulatory procedures existed, but that "the Defendants have failed to show any efforts to establish such a registration system."[47]

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[47]Opinion of District Court, Jurisdiction Statement, Appendix, page 5a.

Drawing upon similar precedent of a soverign's right to destroy property without compensation where no other alternative is presented, this Court, in *Miller v. Schone*, 276 U.S. 272, (1927) at 278-279 stated:

> "The only practicable method of controlling the disease and protecting apple trees from its ravage is the destruction of all red cedar trees, subject to infection, located within two miles of apple orchards. . ."

Even in *Miller*, however, the Court noted that there could not be a blanket destruction of cedars. Destruction was permissible only after the state official had determined, after investigation, that conditions of proximity and disease necessitated destruction.

Particularly in light of the exemptions afforded to certain antiques by the Endangered Species Act of 1973[48] and the exemptions afforded pre-existing artifacts under the Marine Mammal Protection Act,[49] exemptions allowing some commercial uses under the Migratory Bird Treaty Act,[50] and the obvious regulatory provisions which could

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[48]See supra footnote 18.

[49]See supra footnote 18.

[50]See 50 C.F.R. §20.91:

> "§20.91Commercial use of feathers.
> Any person may possess, purchase, sell, barter, or transport for the making of fishing flies, bed pillows, and mattresses, and for similar commercial uses the feathers of migratory water fowl (wild ducks, geese, brant, and swans) killed by hunting pursuant to this part, or seized and condemned by Federal or State game authorities . . . "

That a person can sell a "mattress full" of feathers from newly killed water fowl, but not an antique artifact containing a feather from the same water fowl which was taken in the remote past stretches the logic of the "protective intent" of the Appellants to its utmost.

establish the legitimacy of a particular artifact, the Appellants cannot argue that the sovereign is faced with an imminent and impossible choice permitting such destructive powers as are sought. The 1978 amendment to the Endangered Species Act pursuant to Public Law 95-632, 92 Stat. 3760, 95th Congress, 2nd Session, further suggests that outright prohibitions against all commercial transactions for pre-existing artifacts is unwarranted. The amendment recognizes, most importantly, that documentation can be required, and that the genuineness of an antique artifact can be thus determined.

Far from foreclosing the argument of the Appellees, the recent determinaiton by this Court in *Penn Central Transportation Company v. New York City*, supra, supports the Appellees' view that the confiscatory regulation in the instant case is one which has gone "too far."

In *Penn Central*, Mr. Justice Brennan noted that the major theme of the New York City Landmark Act was to " . . . ensure the owners of any such property both a 'reasonable return' on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals . . . " (*id* at page 639). The Court further noted (*id* at 651) that the parties accepted for purposes of the case:

> ". . . both that the parcel of land occupied by Grand Central Terminal must in its present state, be regarded as capable of earning a reasonable return and that the transferable development rights afforded Appellees by virtue of the Terminal's designation as a landmark were valuable, even if not as valuable as the right to construct above the Terminal."

The elaborate provisions designed to protect vested property rights afforded by the New York Landmark Act

are nowhere presented in the regulations offered by the Appellees in this action.

Nor is any "reciprocity of advantage"[51] offered to the Appellees by the regulations being reviewed. Appellees must bear the complete loss of the value of their property; Appellees' property, by definition, cannot benefit from any other's restriction. Apellees' receipt of value has been made unlawful.

In *Penn Central*, supra, the Court did affirm the Constitutionality of certain restrictions, finding, however, no indication that Penn Central was permanently foreclosed from development of its property: (1) It had not sought approval for the construction of a smaller structure; and (2) the development rights were not abrogated, but were transferable to at least eight parcels in the vicinity of the Terminal.

In the instant action, Appellants would permanently foreclose the Appellees from receiving any value for their collections. No opportunity is to be afforded to the Appellees, suffering a total abrogation of value, to mitigate such harm.

Appellants' citation of cases decided under the Endangered Species Act do not support their position that other regulations are as stringent as those which are pressed in the instant case.

As noted[52] the Endangered Species Act, provides for an exclusion of pre-existing material. Moreover, pursuant to Section 1538(a)(1)(D), the only general prohibition against possession or sale is for any species "taken in violation" of the Act. Such limited application is a critical distinction.

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[51]See supra footnote 41.

[52]See supra p. 16.

As further noted by United States Court of Appeals, Sixth Circuit, in *United States v. Kepler,* 531 F2d 796 (Sixth Circuit 1976), an intrastate market was not foreclosed by the Endangered Species Act. As a continued market was assumed to exist, no Fifth Amendment question was yet presented. *Delbay Pharmaceuticals, Inc. v. Department of Commerce,* 409 F Supp 637, (D.DC, 1976) is similarly distinguished.

Appellants, attempting to minimize the apparent loss of value suffered by the Appellees assert that such artifacts continue to have value:

> "They are still objects of rarity and interest that can be possessed for personal enjoyment or displayed for profit."[53]

Such skeletal remains of the body of private property rights cannot resuscitate the Acts.

As expressed by Mr. Justice Rehnquist, dissenting in *Penn Central*, supra, at page 6645:

> "A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property. [I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." (citations omitted)

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[53]Brief of Appellants, page 33. The concession that a "commercial" use can be made of feathered artifacts is not consistent with Appellants' prior position that *all* commercial uses of pre-existing artifacts must be foreclosed to eliminate the incentive of taking new wildlife. Regardless, a collection of antique artifacts is not the type of property that can generate income by being "displayed for profit." Art collections are loaned to museums and other similar institutions for display, but Appellees are unaware that such collections are otherwise "displayed for profit."

The "reasonable" uses left to the Appellees are the merest veneer of rights. Tested by the hypothesis of *U.S. v. Dickinson*, 331 U.S. 745 (1947), the taking of the heart of Appellees' property rights is apparent:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *id* at 748

The subject matter involved in most of the reported decisions concerning the "taking" question is real property.

Whether real or personal property, however, constitutional protection is afforded. There is little doubt that if the restrictions which the Appellants seek were applied to real property such as that affording habitat to wildlife, the total prohibition of the sale of this "pre-existing" property would be invalidated on its face.

A servitude has undoubtedly been acquired; one which in real property terms would almost certainly constitute an invalid restraint upon alienation if imposed by private parties.

Appellants have stated and continue to state that the intent of the restrictions is to destroy the value of the Appellees' property.[54] The loss of value and the restriction upon the Appellees' lawful occupation is not merely a consequence of regulation. No exemptions, permits, or other administrative relief is afforded.

The Migratory Bird Treaty Act and the Eagle Protection Act which are the subject of this action are not the only wildlife conservation statutes which have been passed by Congress, and moreover, are not concerned solely with wildlife actually threatened with extinction. Nonetheless, Appellants assert that the drastic measures relating to antiquities are required to enforce the Migratory Bird Act and the Eagle Protection Act while such measures are not insisted upon, nor would they be legislatively authorized, under the Marine Mammal Protection Act or the Endangered Species Act. Less drastic procedures such as documentation and registration are readily available to distinguish lawful artifacts, yet the Appellants reject this avenue out of hand, notwithstanding that such is granted by comparable statutes.

[54] Brief of Appellants, pages 13-15.

Nor does the Tucker Act, 28 USC §1491, provide the sole remedy to the Appellees in this action.

This action was brought pursuant to the Declaratory Judgment Act, 28 USC §2201, which, while not extending the jurisdiction of the Federal Court, does provide an additional remedy.

More importantly, as concluded by the District Court, neither the Eagle Protection Act nor the Migratory Bird Treaty Act were intended to apply to pre-existing Indian artifacts. Certainly no intent to condemn or purchase every feathered artifact in the country can be remotely inferred from the language of the Acts.

The application of the Acts by the Appellants to previously existing feathered Indian artifacts is unauthorized and therefore cannot be the act of the government. The Tucker Act affords no remedy in such circumstance. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

CONCLUSION

The District Court was correct in its determination that neither the Migratory Bird Treaty Act nor the Eagle Protection Act applies to pre-existing antiquities.

The Acts must be reasonably applied to protect living birds and to distinguish existing private property by reasonable regulation, not prohibition.

The Acts must be applied so as to avoid the absurdity of dividing "gratuitous" and "commercial" transactions. Such interpretation is incapable of proof and incapable of furthering their protective intent.

The Court was correct in its decision to avoid the grave constitutional doubt of the validity of the Acts by excluding previously existing, lawfully acquired, feathered Indian artifacts from the prohibitions of the statutes.

The decision of the District Court should be affirmed.

Respectfully submitted.

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